

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

11201 RENNER BOULEVARD

LENEXA, KANSAS 66219

2019 AUG 28 AM 8:43

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)

The City of Topeka, Kansas)

Respondent)

Proceeding under Section)
309(a)(3) of the Clean Water Act,)
33 U.S.C. § 1319(a)(3))

Docket No. CWA-07-2019-0135

FINDINGS OF VIOLATION AND
ORDER FOR COMPLIANCE ON
CONSENT

Preliminary Statement

1. The following Findings of Violation and Order for Compliance on Consent (“Order”) are made and issued pursuant to Section 309(a)(3) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a)(3). This Authority has been delegated by the Administrator of the U.S. Environmental Protection Agency (“EPA”), to the Regional Administrator, EPA Region 7 and further delegated to the Director of Region 7’s Enforcement and Compliance Assurance Division.

2. Respondent is the city of Topeka, Kansas (“Respondent” or “the City”), a municipality chartered under the laws of the state of Kansas. Respondent is the owner and/or operator of the Municipal Separate Storm Sewer System (“MS4”), located within the corporate boundary of the city of Topeka, Shawnee County, Kansas.

3. It is the Parties’ intent through entering into this Order to address the City’s alleged noncompliance with the terms and conditions of its MS4 National Pollutant Discharge Elimination System (“NPDES”) permit. As set forth in this Order, the Parties have reached agreement regarding the timeframes for the City to attain compliance with the CWA and its NPDES permit.

4. By entering into this Order, Respondent: (1) consents to and agrees not to contest the EPA’s authority or jurisdiction to issue and enforce this Section 309(a)(3) Order; (2) agrees to undertake all actions required by the terms and conditions of this Order, and (3) consents to be bound by the requirements set forth herein. Respondent further waives any and all remedies, claims for relief and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Order, including any right of judicial review under Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

5. Respondent admits the jurisdictional allegations in this Order and neither admits nor denies the factual allegations and Findings of Violation in this Order.

6. Terms used in this Order that are defined in the CWA or EPA regulations promulgated under the CWA have the meanings assigned to them in the CWA or those regulations, unless otherwise provided in this Order.

Statutory and Regulatory Background

7. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes it unlawful for any person to discharge any pollutant from a point source to waters of the United States, except, among other things, with the authorization of and in compliance with an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

8. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for the discharge of stormwater. Section 402(p)(2) requires permits for five categories of stormwater discharges. Section 402(p)(2)(D) of the CWA, 33 U.S.C. § 1342(p)(2)(D), requires an NPDES permit to be issued for the discharge of stormwater from MS4s serving populations of 100,000 or more but less than 250,000.

9. Section 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B), requires that NPDES permits for discharges from municipal storm sewers shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers and shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design and engineering methods, and such other provisions as EPA or the State determines appropriate for the control of such pollutants. EPA promulgated regulations at 40 C.F.R. Part 122.26 setting forth the NPDES permit requirements for stormwater discharges from medium and large MS4s.

10. Pursuant to Section 402(b) of the CWA, 33 U.S.C. § 1342(b), EPA approved a program authorizing the state of Kansas, through the Kansas Department of Health and Environment (“KDHE”), to issue and administer NPDES permits as forth in the CWA for the discharge of pollutants from point sources to waters of the United States. Any such discharge is subject to all applicable requirements of the CWA, and regulations promulgated thereunder, as expressed in the specific terms and conditions prescribed in the applicable permit.

11. Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), authorizes EPA to issue a compliance order to commence a civil action for appropriate relief against any person who EPA finds is in violation of, among other things, Section 301(a) of the CWA or any permit condition or limitation implementing the CWA in an NPDES permit issued by a State.

Factual Background

12. Respondent is an incorporated municipality chartered under the laws of the state of Kansas, and as such, is a “person,” as that term is defined in Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2, and is an “incorporated place” as that term is defined in 40 C.F.R. § 122.26(b)(3).

13. Respondent has a population of 100,000 or more but less than 250,000, and operates a separate conveyance system for collecting stormwater, which consists of, among other things, drain inlets, storm sewers, and outfalls, and as such, operates a “medium municipal separate storm sewer system” as that term is defined in 40 C.F.R. § 122.26(b)(7)(i).

14. Respondent’s MS4 discharges stormwater to receiving waters within the corporate boundaries of the City served by the MS4, including the Kansas River. The Kansas River and other receiving waters are “navigable waters” under Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and 40 C.F.R. § 122.2 (1993).

15. Respondent’s MS4 is a “point source” that “discharges pollutants” into “navigable waters” as defined in Sections 502(14), (12), and (7) of the CWA, 33 U.S.C. § 1362(14), (12), and (7), respectively.

16. Respondent’s discharges from its MS4 require an NPDES permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and 40 C.F.R. § 122.26.

17. On August 1, 2014, KDHE reissued to Respondent an NPDES permit, KS-0093327, which expires on July 31, 2019 (“MS4 Permit”). Respondent’s MS4 Permit authorizes discharges of stormwater to all areas within Respondent’s jurisdiction (“Permit Area”) subject to the limitations, conditions, and requirements set forth in the MS4 Permit.

18. On or about April 2 through 6, 2018, EPA performed an inspection of Respondent’s MS4 under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate Respondent’s compliance with the terms and conditions of the MS4 Permit in accordance with the CWA.

19. On April 6, 2018, EPA issued a Notice of Potential Violation (“NOPV”) to Respondent. On April 18, 2018, Respondent submitted a response to EPA’s NOPV.

20. On March 9, 2019, EPA received from KDHE Respondent’s MS4 annual report for calendar year 2018, which covers the activities during the year and includes the status of Respondent’s compliance with permit conditions, as required by Part V of the MS4 Permit.

Findings of Violation

21. The facts stated in Paragraphs 12 through 20 above are herein incorporated.

**Count 1 – Failure to Update and Implement Best Management Practices
for the Six Minimum Control Measures**

22. Part I.C. of the MS4 Permit requires Respondent to continue to review, update and implement best management practices (“BMPs”) with measurable goals for the six minimum control measures identified in Part 1.C.1 through 6. This Part also contains a link to KDHE’s Fact Sheet: Six Minimum Control Measures for MS4s with NPDES Permits, which contains the general requirements for implementation of the six minimum control measures (“Fact Sheet”).

23. Parts I.A. and I.B. of the MS4 Permit require Respondent to implement and enforce a Stormwater Management Plan (“SMP”) to, among other things, continue to implement the six minimum control measures. Respondent’s current SMP is dated March 28, 2018 and contains the BMPs that Respondent must implement to satisfy the minimum control measures and other required program elements established in the MS4 Permit.

24. Standard Condition 11 of the MS4 Permit requires Respondent to retain for a minimum of three years all records and information resulting from the monitoring activities required by the Permit, including all records of analyses and calibration and maintenance of instruments and recordings from continuous monitoring instruments, unless otherwise specified.

25. Part I.C.4. of the MS4 Permit requires Respondent to review, update, and implement BMPs with measurable goals for Construction Site Stormwater Runoff Control (“CSSRC”). Additionally, KDHE’s Fact Sheet requires Respondent to develop, implement, and enforce a program to reduce pollutants in any stormwater runoff to the MS4 from construction activities. The program must include the development and implementation of, among others: requirements for construction site owners or operators to control waste that is likely to cause adverse impacts to water quality; procedures for site plan review which incorporate consideration of potential water quality impacts; and procedures for site inspection and enforcement of control measures. Section 2.4 of the SMP requires Respondent to review and document erosion and sediment control plans, perform construction site inspections, and perform and document enforcement actions when violations of the City’s erosion and sediment control ordinance are identified.

26. EPA’s inspection revealed that Respondent failed to adequately implement and enforce a program to reduce pollutants in stormwater runoff to the MS4 from construction activities. Specifically, Respondent failed to adequately conduct and/or document erosion and sediment control plan reviews and site inspections, and address noncompliance with stormwater control requirements identified during inspections through enforcement actions. Information obtained during the inspection shows that Respondent completes written reports for a limited subset of the total stormwater inspections conducted annually. Furthermore, Respondent’s inspection checklist lists five potential consequences for noncompliance, including fines and stop

work orders. Respondent provided no information documenting the use of these measures after identifying noncompliance during stormwater inspections at construction sites.

27. Part I.C.5. of the MS4 Permit requires Respondent to review, update, and implement BMPs with measurable goals for Post-Construction Stormwater Management in New Development and Redevelopment Projects. Additionally, KDHE's Fact Sheet requires Respondent to develop, implement, and enforce a program to address post-construction stormwater runoff. The program must include the development and implementation of, among others: BMPs to prevent or minimize adverse water quality impacts; strategies which include a combination of structural and/or non-structural BMPs appropriate for the municipality; and ensure adequate long-term operation and maintenance of BMPs.

28. EPA's inspection revealed that Respondent failed to adequately develop, implement and enforce a program to address post-construction stormwater runoff. Specifically, Respondent failed to document post-construction plan reviews to reduce impacts to water quality. Additionally, Respondent failed to ensure long-term operation and maintenance of BMPs by not developing an inspection frequency to evaluate implementation of post-construction controls at sites and failing to document inspections of post-construction sites to prevent or minimize adverse water quality impacts.

29. Part I.C.6. of the MS4 Permit requires Respondent to review, update, and implement BMPs with measurable goals for Pollution Prevention/Good Housekeeping for Municipal Operations. Additionally, KDHE's Fact Sheet requires Respondent to develop and implement an operation and maintenance program that includes employee training to prevent and reduce stormwater pollution from municipal activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and stormwater system maintenance.

30. EPA's inspection revealed that Respondent failed to develop and implement adequate procedures and controls to prevent and reduce pollutants entering stormwater from municipal activities. Specifically, Respondent failed to develop and implement BMPs and conduct inspections of BMPs at municipally-owned facilities that are not subject to an NPDES permit.

31. Respondent's failures described in Paragraphs 22 through 30, above, are violations of the conditions and/or limitations in Respondent's MS4 Permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and as such, are violations of the CWA.

Count 2 - Failure to Implement Adequate BMPs to Reduce TMDL Pollutants to the Maximum Extent Practicable

32. Part II. of the MS4 Permit contains a table that lists the following Total Maximum Daily Load (“TMDL”) regulated pollutants applicable to Respondent:

TMDL Regulated Pollutant	Specific Impaired Stream or Lake to Target
Bacteria	Kansas River, South Branch Shunganunga Creek, Shunganunga Creek, Deer Creek
Nutrients	Kansas River, MS4 discharges to Lake Shawnee
Sediment	Kansas River

33. Part I.E of the MS4 Permit requires Respondent to continue to review, update, implement and develop, when necessary, structural and non-structural BMPs which will reduce to the maximum extent practicable the discharge of the TMDL regulated pollutants from the MS4. These requirements must be discussed in Respondent’s SMP. Part I.E.1.g. and h. require Respondent to identify in the SMP an inspection/maintenance plan for each BMP, as appropriate, and a plan and schedule to monitor the effectiveness of the BMPs.

34. Part I.E.2 of the MS4 Permit requires Respondent to establish measurable goals to assess the effectiveness of the TMDL BMPs. Part I.E.2.a. of the MS4 Permit requires overall TMDL measurable goals to be based upon instream sampling of the main stream(s) existing in or entering and leaving the Permit Area during or immediately following storm events.

35. Part IV of the MS4 Permit provides a schedule for certain activities required by the Permit. Part IV.C. requires Respondent to continue source control programs and monitoring of storm events at selected sites during 2016 and, by July 1, 2016, select, design, and initiate installation of appropriate structural BMPs. Part IV.D. requires Respondent to continue BMP installation and/or source control programs and stream/lake/BMP outfall monitoring as appropriate during 2017 and to complete BMP installations by the end of the year. Part IV.E. requires Respondent to continue stream/lake BMP monitoring and effective source control programs during 2018.

36. Respondent has developed four BMPs to reduce TMDL regulated pollutants: (1) distribute brochures and handouts highlighting strategies to reduce TMDLs; (2) display for regulated TMDL parameters and their associated river or stream; (3) regulation of septic systems including response to complaints, improper discharges, and reviewing requests to install and/or maintain septic systems within the MS4; and (4) continue current construction inspections.

37. From at least July 1, 2016 to the present, Respondent has not updated, modified or added any BMPs to reduce the TMDL pollutants for the impaired waters listed in the MS4 Permit. Therefore, Respondent has failed to review, update, implement and develop structural and/or non-structural control BMPs to reduce to the maximum extent practicable the discharge of TMDL regulated pollutants from the MS4.

38. Respondent's failures described in Paragraphs 32 through 37, above, are violations of the conditions and/or limitations found in Respondent's MS4 Permit, issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and as such, are violations of the CWA.

Reasonable Time to Achieve Compliance

39. Pursuant to Section 309(a)(5)(A) of the CWA, 33 U.S.C. § 1319(a)(5)(A), and having taken into account the seriousness of the violations, the EPA finds that December 31, 2020 is a reasonable date for Respondent to achieve compliance with the requirements of this Order.

Order for Compliance

40. Based on the factual allegations and Findings of Violation set forth above, and pursuant to the authority of Sections 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Respondent is hereby ORDERED to take the actions described below.

41. Within sixty (60) days of the Effective Date, Respondent shall submit to EPA a Compliance Plan that includes:

- a. A description of actions taken or to be taken to correct the deficiencies and eliminate and prevent recurrence of the alleged violations identified in this Order and to come into compliance with all applicable requirements of Respondent's MS4 Permit. This includes, as necessary:
 - i. Development and implementation of standard operating procedures and revisions to the SMP; and
 - ii. Additional BMPs targeted to reduce TMDL pollutants, including: (1) addressing controllable sources of bacteria through programs to manage waste from pets, horse and livestock, geese, and zoo animals; (2) controlling nutrients from municipal facilities and private property through landscaping, public education and outreach; and (3) updating Respondent's Soil Erosion and Sediment Control Plan.
- b. A schedule, subject to EPA approval, for implementation of each of the proposed actions. All actions must be completed by December 31, 2020.

Reports/Submissions

42. *Final Report.* By March 31, 2021, Respondent shall provide EPA and KDHE a final report describing the actions the City has taken to correct the deficiencies and eliminate and prevent recurrence of the alleged violations cited above and explaining why such actions are anticipated to be sufficient to prevent recurrence of these or similar violations.

43. *Semi-Annual Reporting.* In addition to the information required above, Respondent shall submit semi-annual reports describing the actions it has taken to ensure continued compliance with the terms of its Permit and this Order. These reports are due beginning six (6) months from the Effective Date and every six (6) months thereafter until the Order is terminated. The first semi-annual report may reference the final report where duplicative information is required. Each semi-annual report shall include, at a minimum:

- a. A description of implementation and/or revision of the SMP during the previous six (6) month period;
- b. A description of work and other actions taken to construct structural controls and/or implement other controls in the previous six (6) month period;
- c. Copies of all relevant documentation regarding the activities described pursuant to subparagraphs (a) and (b), including but not limited to inspection reports, monitoring records, and enforcement actions; and
- d. Any Permit violations, including the specific condition violated, the duration, and the corrective actions taken or to be taken.

44. *Submittals.* All documents and other information required to be submitted to EPA by this Order shall be submitted by electronic mail to:

sans.cynthia@epa.gov

Cynthia Sans
U.S. Environmental Protection Agency Region 7
Water, Wetlands and Pesticides Division
11201 Renner Boulevard
Lenexa, Kansas 66219.

45. Electronic submissions to the EPA will be deemed submitted on the date they are transmitted electronically. Any report, notification, certification, or other communication that cannot be submitted electronically to the EPA shall be submitted in hard-copy to the address provided above.

46. All documents required to be submitted pursuant to this Order shall also be submitted by mail to KDHE to:

Tom Stiles, Acting Director
Kansas Department of Health and Environment
Bureau of Water
1000 SW Jackson Street, Suite 420
Topeka, Kansas 66612-1367

47. After review of the schedule required by Paragraph 41(b) of this Order, EPA may approve or disapprove the schedule, in whole or in part. EPA shall approve the schedule or any portion so long as the submission fulfills the requirement under this Order. Upon EPA approval, the schedule by Respondent is incorporated and enforceable as part of this Order. Respondent shall implement the Compliance Plan required by Paragraph 41(a) according to the approved schedule.

48. If EPA disapproves the schedule, EPA will notify Respondent in writing, which may include notice by email, and EPA may require Respondent to supplement or modify its schedule. Within 30 days following receipt of written notice of EPA's disapproval, Respondent must submit a corrected schedule to EPA for approval. In the event that Respondent's modified schedule is disapproved in whole or in part by EPA, EPA may require Respondent to correct the deficiencies or EPA may determine that the schedule fails to meet the requirements of this Order.

49. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 48, above, Respondent must proceed to take all actions and provide all submissions required under this Order, including any actions required under any non-deficient portion(s) of its submission, if such action can be undertaken independent of the deficient portion of Respondent's submission.

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

50. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude EPA from, initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or to seek additional injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

51. This Order does not constitute a waiver or a modification of any requirements of the CWA, 33 U.S.C. § 1251 et seq., all of which remain in full force and effect. EPA retains the right to seek any and all remedies available under Sections 309(b), (c), (d), or (g) of the CWA, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. Issuance of this Order shall not be deemed an election by EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for any violation whatsoever.

52. Failure to comply with this Order may subject Respondent to penalties up to \$54,833 per day for each violation pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19.

Access and Requests for Information

53. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect Respondent's facility, and/or to request additional information from Respondent, pursuant to the authority of Section 309 of the CWA, 33 U.S.C. § 1319 and/or any other authority.

Severability

54. If any provision or authority of this Order, or the application of this Order to Respondent, is held by federal judiciary authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

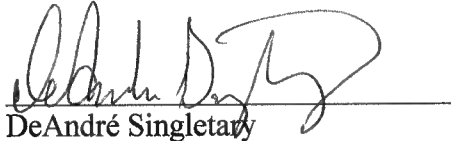
Effective Date

55. The terms of this Order shall be effective and enforceable against Respondent on the Effective Date, which is the date this Order is signed by EPA.

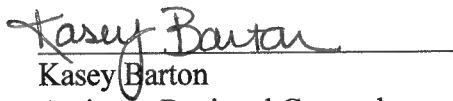
Termination

56. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of the EPA.

Issued this 22nd day of August, 2019.



DeAndré Singletary
Acting Director
Enforcement and Compliance Assurance Division



Kasey Barton
Assistant Regional Counsel
Office of Regional Counsel

For the Respondent, City of Topeka, Kansas:

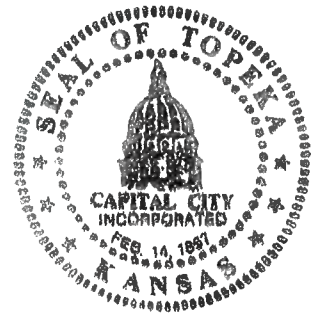
Brent Trout
Signature

8-21-19
Date

BRENT TROUT
Name

CITY MANAGER
Title

ATTEST:
Brenda Younger
CITY CLERK



CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Findings of Violation and Administrative Order for Compliance to the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 661219.


I further certify that on the date noted below I sent a copy of the foregoing Order for Compliance by first class certified mail, return receipt requested, to:

Brenda Younger
City Clerk
215 SE 7th Street, Room 166
Topeka, Kansas 66603

and via first class mail to:

Tom Stiles, Acting Director
Kansas Department of Health and Environment
Bureau of Water
1000 SW Jackson Street, Suite 420
Topeka, Kansas 66612-1367.

8/23/19
Date


Signature